

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LUIS RINCON D/B/A	:	
NEW WAY SUPERMARKET	:	DETERMINATION
	:	DTA NO. 818597
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 1997 through August 31, 2000.	:	

Petitioner, Luis Rincon d/b/a New Way Supermarket, 2095 Gruger Avenue, Bronx, New York 10462, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1997 through August 21, 2000.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 10, 2002 at 10:30 A.M., with all briefs to be submitted by September 20, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Angel L. Munoz, CPA, d/b/a Professional Services (Rocio C. Cepeda and Cindy Morales). The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly estimated the taxable sales of petitioner's grocery store.

FINDINGS OF FACT

1. Petitioner, Luis Rincon, operated a small grocery store or bodega at 3963 Bronxwood Avenue in the New York City borough of the Bronx from the fall of 1997 until July 20, 2000 when he sold the business to Rafael Taveras. Petitioner's store sold cigarettes, soda, beer, paper products, cold cuts, and sandwiches. The premises, described by an investigator of the Division of Taxation ("Division") as "a small supermarket," also included four aisles of dry grocery items.

2. On his sales tax returns for the period at issue,¹ petitioner reported gross sales, taxable sales, and tax due as follows:

Quarter Ended	Gross sales	Taxable sales	Tax due at 8¼%	Vendor collection credit for timely-filed, fully-paid returns	Credit for prepaid sales tax on cigarettes	Tax due
11/30/97	\$23,441.00	\$ 9,875.00	\$814.69	(\$5.93)	(\$526.50)	\$282.26
02/28/98	25,220.00	10,117.00	834.65	(6.07)	(565.50)	263.08
05/31/98	22,915.00	9,899.00	816.66	(5.93)	(507.00)	303.73
11/30/98	23,825.00	10,112.00	834.24	(6.06)	(487.50)	340.68
02/28/99	22,150.00	9,325.00	769.31	-0- ²	(507.00)	262.31
05/31/99	21,925.00	8,515.00	702.48	-0-	(526.50)	175.98
08/31/99	21,995.00	8,265.00	681.86	-0-	(546.00)	135.86
11/30/99	22,425.00	8,541.00	704.63	-0-	(546.00)	158.00
02/29/00	23,715.00	8,933.00	736.97	(12.50)	(448.50)	275.97

¹ Petitioner introduced into evidence copies of his sales tax returns for nine of the twelve quarters at issue. No returns were produced for the periods June 1, 1998 through August 31, 1998, March 1, 2000 through May 31, 2000, and June 1, 2000 through August 31, 2000.

² The returns for the periods ended February 28, 1999, May 31, 1999, August 31, 1999 and November 30, 1999 were each dated December 20, 1999, and no vendor collection credit for a timely-filed, fully-paid return was claimed.

The taxable sales reported by petitioner on his tax returns, expressed as a percentage of his reported gross sales, ranged between 38% and 42%. Further, petitioner's prepaid sales tax on cigarettes represented a substantial percentage of his store's total sales tax reported for each of the quarters for which sales tax returns were produced as follows:

Quarter ended	Prepaid sales tax on cigarettes as a percentage of total sales tax reported due
11/30/97	65%
02/28/98	68%
05/31/98	62%
11/30/98	58%
02/28/99	66%
05/31/99	75%
08/31/99	80%
11/30/99	77%
02/29/00	61%

3. The Division received a Notification of Sale, Transfer or Assignment in Bulk dated July 20, 2000 from Rafael Taveras providing information concerning the sale by petitioner to him of the Bronx grocery store for a total sales price of \$80,000.00. This sales price of \$80,000.00 was allocated to the assets sold as follows: tangible personal property (furniture, fixtures, etc.),³ \$2,000.00; merchandise inventory for resale, \$15,000.00; and intangible property (goodwill, etc.), \$63,000.00. In response, the Division issued a letter dated September 6, 2000 to petitioner informing Mr. Rincon of its receipt of the notification of bulk sale and "[b]ased on a review of your sales tax history you have been selected for a Sales Tax Desk Audit." In addition to informing petitioner that the purchaser of the grocery, Mr. Tavares, had been advised to

³ A coffee machine and an ice cream freezer were specifically excluded from the sale.

release no funds until the audit had been resolved, petitioner was asked to provide copies of his “business related books and records” including the following specific items: (i) Federal returns, including all related schedules, for the audit period denoted as 12/01/97 to 8/31/00; (ii) sales invoices and/or cash register tapes for each sale; (iii) purchase ledgers and invoices, cash disbursements journal; (iv) bank deposit slips; and (v) lease agreement for the business location.

4. Petitioner provided no records of any type to the Division in response to its request dated September 6, 2000. Petitioner admitted that he did not have any records that showed the grocery store’s actual sales.

5. As part of its audit, an investigator for the Division visited the Bronx location of petitioner’s store. The investigator observed that the premises consisted of approximately 1,320 square feet (30 feet by 44 feet), and that the store sold the items as detailed in Finding of Fact “1”. The investigator spoke to Rafael Tavares, the current owner of the store, who “advised me that he was operating the business in the same way as had Mr. Rincon, and that his daily gross sales were approximately \$700.”

6. The Division’s auditor, based upon his audit experience as well as information obtained from a Robert Morris Associates Annual Statement Studies 1999-2000 which was commonly used by him in the performance of desk audits, estimated that petitioner’s Bronx grocery store had taxable sales which were 40% of its gross sales. Consequently, he multiplied the amount of daily gross sales of \$700.00 approximated by Mr. Tavares by 90, the number of days in a sales tax quarter. That sum of \$63,000.00 was then multiplied by the taxable ratio factor of .40 to

determine taxable sales for the quarter of \$25,200.00. The auditor then applied a sales tax rate of 8.25%⁴ to compute sales tax due per quarter of \$2,079.00.

7. The Division issued a Notice of Determination dated November 20, 2000 against petitioner asserting tax due of \$20,710.00, plus interest and penalty, for the period September 1, 1997 through August 31, 2000.⁵ Tax asserted due of \$20,710.00 was allocated over this period as follows:

Tax Period Ended	Tax Amount Asserted Due
11/30/97	\$ 1,265.00
2/28/98	1,244.00
5/31/98	1,262.00
8/31/98	1,803.00
11/30/98	1,803.00
2/28/99	1,803.00
5/31/99	1,803.00
8/31/99	1,912.00
11/30/99	1,912.00
2/29/00	1,912.00
5/31/00	1,912.00
8/31/00	2,079.00
Total	\$20,710.00

⁴ In his affidavit dated June 4, 2002, the Division's auditor mistated that in determining sales tax due per quarter, he applied a sales tax rate of 8.5%. In point of fact, he applied the correct sales tax rate for New York City of 8.25% in calculating sales tax due per quarter of \$2,079.00.

⁵ Multiple copies of an undated Statement of Proposed Audit Change for Sales and Use Tax with a payment due date of November 9, 2000 are included in the audit file. This undated statement shows tax due for the period at issue of \$27,838.00. There is no explanation in the record for this higher amount of \$27,838.00, which is \$7,128.00 greater than the \$20,710.00 asserted due in the Notice of Determination dated November 20, 2002.

8. At the time of his sale of the grocery store to Mr. Tavares, petitioner was behind in the payment of many of his bills. In particular, he was in debt to his meat and milk suppliers, accountant, Federal and State tax authorities, and owed rent to the store's landlord. He viewed his sale of the grocery store as a way to catch up on his debts and financial obligations.

SUMMARY OF THE PARTIES' POSITIONS

9. The Division maintains that it selected an audit method that reasonably calculated the tax due in light of petitioner's failure to maintain and provide to its auditor adequate books and records. It contends that its use of the Robert Morris Associates Annual Statement Studies to determine the percentage of taxable sales was reasonable, and that its reliance on its investigator's report was never contravened by clear and convincing evidence brought forward by petitioner. Further, the Division argues that since petitioner's store sold various taxable items such as beer, soda and sandwiches, its cigarette sales, which represented between 58% and 80% of petitioner's reported taxable sales, suggest that taxable sales of these other items were underreported.

10. Petitioner contends that the buyer of his store may "operate the store the same way I do, but with more money" (tr., p. 63). According to petitioner, he did not operate the store with as much inventory as Mr. Tavares. Consequently, although Mr. Tavares may currently average \$700.00 in daily sales, petitioner alleges that when he owned the business he did not. He also points to his substantial indebtedness at the time he sold his business to show "that the business was not doing well" (tr., p. 50).

CONCLUSIONS OF LAW

A. Every person required to collect sales tax must maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a][1]). As noted in Finding of Fact “4”, petitioner did not maintain any records sufficient to verify his store’s daily sales. Consequently, the Division’s right to resort to an estimate of his store’s sales, as long as it selected an audit method reasonably calculated to reflect the sales and use taxes due, remains unassailable (*see, Matter of Grant v. Joseph*, 2 NY2d 196, 204, 159 NYS2d 150, 157, ***cert denied*** 355 US 869).

B. The Division’s use of its investigator’s report and the Robert Morris Associates Annual Statement Studies, as detailed in Finding of Fact “6”, provided a reasonable basis for calculating petitioner’s sales (*see, Matter of Grecian Square v. State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219). Consequently, the burden of proof was on petitioner to show, by clear and convincing evidence, that the result of this estimate of his taxable sales was unreasonably inaccurate or that the amount of tax assessed was erroneous (*Matter of Sarantopoulos*, Tax Appeals Tribunal, February 28, 1991).

C. Petitioner failed to produce any evidence sufficient to meet his fairly substantial evidentiary burden. His testimony concerning his indebtedness at the time he sold the store to Mr. Tavares was inadequate to sustain this burden. Further, at the hearing, petitioner reserved time to submit an affidavit from Mr. Tavares to elaborate on his earlier statement to the Division’s investigator that “he was operating the business in the same way as had Mr. Rincon, and that his daily gross sales were approximately \$700,” as noted in Finding of Fact “5”. Petitioner’s failure to submit such affidavit must be held against him (*see, Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, ***lv denied*** 91 NY2d 811, 671

NYS2d 714; *Matter of Greenwald*, Tax Appeals Tribunal, November 24, 1993). In addition, the Division correctly points out that petitioner's prepaid sales tax on cigarettes represented such a substantial percentage of his store's total taxable sales to suggest that Mr. Rincon underreported his other taxable sales including the taxable sale of beer, soda and sandwiches. Petitioner has offered no evidence to counter such implication.

D. Nonetheless, the record supports the granting of petitioner's petition to the following extent. First, as noted in Finding of Fact "1", petitioner sold his business on July 20, 2000. Consequently, the Division's assertion of tax due of \$2,079.00 for the period June 1, 2000 to August 31, 2000 must be reduced based upon this sale date in the middle of the final sales tax quarter at issue. Second, as noted in Finding of Fact "2", petitioner was entitled to a credit for prepaid sales tax on cigarettes for each of the nine sales tax quarters for which he introduced his sales tax returns and thereby provided some proof of the specific amounts for prepaid sales tax on cigarettes. For the other three quarters at issue there is simply no evidence in the record of prepaid sales tax on cigarettes. Consequently, the Division is also directed to recalculate tax due for such nine quarters by allowing the credits for prepaid sales tax on cigarettes as noted above in Finding of Fact "2".

E. Finally, although petitioner has not specifically contested the imposition of penalty, the Division is correct that petitioner has failed to establish that his failure to pay tax was due to reasonable cause and not due to willful neglect (*see, Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993).

F. The petition of Luis Rincon d/b/a New Way Supermarket is granted to the extent indicated in Conclusion of Law "D", and the Division is directed to modify the Notice of

Determination dated November 20, 2000 accordingly, but, except as so granted, the petition in all other respects, is denied.

DATED: Troy, New York
January 30, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE